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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

Nos. 520, 521, 522, 523 AND 524.

PARAMOUNT PICTURES, INC., PENNWARE THEATRE CORPORATION, A. N. NOTOPOULOS, RKO RADIO PICTURES, INC., LOEW'S INCORPORATED, TWENTIETH CENTURY-FOX FILM CORPORATION, AND PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioners,

v.

HARRY NORMAN BALL, TRUSTEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

The statement of facts as set forth by petitioners demands a counter-statement by the respondent at least with respect to certain matters.

The respondent, in addition to his original investment in the Penn Theatre, expended more than $30,000. (R. 74a) for its restoration and re-equipment after Pennware Theatre Corporation had moved out. His total investment is in excess of $140,000 (R. 611a) which is greater than the cost of the State Theatre (R. 571a, 574a).

The first run product of the distributor-petitioners had been exhibited for over ten to thirteen years prior to 1944 at the respondent's theatre (R. 4, 216a, 277a, 287a, 292a, 357a) which was in the "100% location" in the town of Ambridge (598a, 599a).

When Pennware—whose stock was owned 50% by Paramount and whose Board of Directors consisted of three members, two of whom were Paramount officials (R. 236a, 237a)—moved from the Penn Theatre, all of the distributor-petitioners declined to license any of their first run product for exhibition at the Penn Theatre, irrespective of prices or terms (R. 88a, 89a, 93a, 94a, 107a, 122a, 132a, 584a, 591a). The first run product of distributor-petitioners was removed to the State Theatre, which during a time of war had been converted by Pennware Theatre Corporation from a garage to a theatre (R. 4), and the respondent, who was thereafter unable to obtain any first run pictures from the distributor-petitioners (R. 5, 39a, 40a) was required to keep his theatre closed (R. 136a).

The president of Paramount Pictures, Inc. testified that it was common sense to move all product to a new theatre taken over by Paramount if such action would increase its revenue (R. 390a).

The record shows with reference to rental that the respondent also made offers to lease his theatre at any rental to be fixed by arbitration (R. 614a, 574a). When he sought to oust petitioners from his theatre, the rent had been unpaid for two months (R. 611a). Also, the Pennware Theatre Corporation was in the process of constructing a new theatre at least six months prior to the termination of the lease (R. 612a).

The respondent testified that his conversation with an officer of Warner Brothers was for the purpose of exploring the possibilities of procuring tenants or operators for the Penn Theatre (including even the possibility of some joint operation) in the event that it became necessary for the respondent to operate it (R. 612a).

Petitioner Notopoulos, president of Pennware, threatened to damage physically the theatre (R. 503a). Petitioners Paramount and Pennware threatened to remove the first run product therefrom (R. 30a, 31a, 47a). The theatre was damaged (Respondent's Exhibits 1-15, inc., R. 57a-63a) and the first run product was removed (R. 39a, 40a).

Argument.

I. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT HAD FAILED TO ACCEPT THE CLEAR IMPLICATIONS ARISING FROM PETITIONERS' ACTS AND CONDUCT.

The Court of Appeals, after a careful review of the evidence, by its decision of July 21, *1948* (concerning which the petitioners had not sought review by this Court either by petition for certiorari or otherwise until the filing of the present petition on January 3, *1950*) correctly held that there was a conspiracy among the petitioners under the Sherman Act and Clayton Act, and correctly rejected the conclusion of the District Court that the actions of the distributors in uniformly and simultaneously shutting off their product from the Penn Theatre was "merely an amazing coincidence".

Rule 52 (a) does not require a Court of Appeals in reviewing the record of the District Court to accept inferences and conclusions which the District Court has made from the material facts in the case, nor does it prevent a Court of Appeals from considering uncontroverted salient facts which had been overlooked by the District Court. The designation by a District Court of a so-called finding as a "Finding of Fact" does not remove such matter from the examination and consideration of a Court of Appeals.

In *Baumgartner v. United States,* 322 U. S. 665, (1944) this Court, through Mr. Justice Frankfurter, said on page 670:

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony

which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."

See also *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948) in which Mr. Justice Reed said on page 395:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Not only was the Court of Appeals permitted to consider the inferences and conclusions made by the District Court under any circumstances, but it was all the more necessary that that court do so since part of the evidence had originally been heard by Judge Schoonmaker, who died after *half* of the witnesses in the case, including some of petitioners' witnesses, had testified and the direct

portion of the respondent's case had been presented (R. 4). Thereafter, the balance of the case was heard by Judge Gibson, who was in no better position to consider the testimony presented before Judge Schoonmaker than was the Court of Appeals who reviewed the entire record. The record in this case cannot be arbitrarily divided into two parts—one heard by Judge Schoonmaker and the other heard by Judge Gibson, and a finality given the findings of fact which in some respects related to witnesses which Judge Gibson heard, especially since the direct portion of respondent's case with respect to the conspiracy had not been heard by him but by Judge Schoonmaker.

The petitioners have argued that because the District Court found that mass buying power was not employed at all, such finding was conclusive in this matter; when, as a matter of fact, the holding of the District Court was merely an inference and conclusion on the vital question of conspiracy and was clearly erroneous both as to fact and inference. The basic facts in the case are indisputable and were recognized by the Court of Appeals. Before the lease for the Penn Theatre had expired, work on the erection of the State Theatre had been commenced (R. 612a). The lease for the Penn Theatre was not renewed and the State Theatre was then opened (R. 219a, 357a). The product which had theretofore been enjoyed by the Penn Theatre was then transferred by the petitioners to the State Theatre, and the respondent, as the owner and operator of the Penn Theatre, from that time on was unable to obtain the product to which the Penn Theatre was entitled and was denied access to any first-run products of petitioners (R. 39a, 40a).

The fact that various witnesses who testified on behalf of the petitioners stated that they did not actively conspire against the respondent, and did not know of any conspiracy, does not by any means negative the inescapable conclusion that there was a violation on the part of the petitioners of the anti-trust laws. What the petitioners did

in fact speaks so loudly that the Court of Appeals in reviewing the matter could not and did not accept their oral protestations to the contrary.

In *United States v. Griffith*, 334 U. S. 100 (1948), this Court very clearly pointed out that a conspiracy can be found as a consequence of a defendant's conduct and business arrangements and that it is not always necessary to find a specific intent to restrain trade or to build a monopoly.

The argument of petitioners that respondent intended to gain a monopoly position with Warner Bros. is obviously made to distract attention from the fact that Warner Bros. and Paramount's affiliate Pennware Theatre Corporation enjoyed a monopoly position in Ambridge for more than ten years prior to the purchase by respondent of the Penn Theatre, that during such time they made a division between themselves of all first-run product, and that for some time thereafter that arrangement between Warner Bros. and Pennware continued while respondent's theatre was closed. The common business interests of Warner Bros. and Paramount, running into millions of dollars of transactions between them (R. 403a-407a) demonstrates the absurdity of such a charge. The sole basis relied upon by petitioners for such argument is the fact that respondent, in the interest of preserving an investment, sought to explore the possibilities about the operation of his property and made inquiry of several possible lessees or operators of theatres, including Warner Bros. (R. 612a).

Finally, the Court of Appeals, while recognizing the charges and counter-charges which normally arise under similar situations, and after fully considering the same questions which have been raised by the petitioners in their Petitions for a Writ of Certiorari, concluded that the petitioners had violated the Sherman and Clayton Acts in "shutting off of first runs" from the Penn Theatre, and that a careful study of any action on the part of the respondent "develops no excuse for the stoppage by ap-

pellees of Penn Theatre's first runs" (R. 9). The evidence and record pointed unmistakably to the conclusion that the petitioners who represented "all branches of this tremendous industry are engaged in a conspiracy against the appellant (respondent herein) that is both horizontal and vertical" (R. 9).

II. AN INJUNCTION DECREE UNDER THE SHERMAN AND CLAYTON ACTS MAY PROPERLY IMPOSE UPON CONSPIRATORS THE BURDEN OF PROVING COMPLIANCE THEREWITH IN ANY PROCEEDING FOR ALLEGED VIOLATION.

A consideration of the nature of proceedings under the Sherman Act and the Clayton Act and of the relief to be afforded a successful plaintiff thereunder will reveal the reason for such a provision, as was recognized by the Court of Appeals in its opinion dated July 29, 1949 (R. 20):

> ". . . we are interested primarily in seeing to it that the decree really works out in practical fashion as intended. . . . we are desirous of eliminating as far as possible, any excuse for unnecessary, harassing litigation by either side. Having appellees establish compliance with the decree will be of substantial help to that end. This will cause no undue hardship to appellees. Indeed, it can be far more easily and satisfactorily accomplished by them than by appellant. Within their own organization, nationwide statistics are readily available concerning film rentals and other comparative picture and theatre data. Most of such special knowledge would be difficult if not impossible for appellant to obtain. The procedure indicated finds strong support in United States v. Paramount Pictures, Inc., 334 U. S. 131."

In *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944), this Court through Mr. Justice Douglas said on page 186:

"Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent of a repetition of the unlawful conduct . . ."

It is significant that the petitioners have been unable to submit any citation which would hold such a provision to be improper.

III. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE COURT OF APPEALS OF ANY OTHER CIRCUIT.

The decision of the Court of Appeals in no way conflicts with any decision of this Court or of any Court of Appeals. In fact, the case is simply that of a private litigant who was excluded from the motion picture industry and whom the Court of Appeals has held is entitled to the relief afforded by the Sherman and Clayton Acts.

The decisions cited by the petitioners do not present any conflict.

The distinction between the present litigation and that in *United States v. Yellow Cab Company,* 338 U. S. 338 (1949), is obvious. Counsel for the defendant in the *Yellow Cab Company* case has informed us that the entire case was tried in open court before one judge who heard and saw all the witnesses and that no testimony was presented by depositions. Furthermore, in that case, the Government, as appellant, challenged *all* the findings of fact made by the trial court, and this Court declined to upset findings of fact made upon conflicting but *substantial* evidence. In the present case, the Court of Appeals did not overturn any true finding of fact. What it did, we feel, was to follow the latest pronouncements of this Court in the cases of *United States v. Paramount Pictures, Inc.,* 334 U. S. 131 (1948), *United States v. Griffith,* 334 U. S. 100 (1948), and *Schine Theatres v. United States,* 334 U. S. 110 (1948), and to draw inferences and conclusions from the admitted or

indisputable facts, even though they were contrary to the conclusions made by the trial court, which, at the time of its decision, did not have the benefit of those opinions.

The two cases of *Westway Theatre v. Twentieth Century-Fox Film Corporation,* 30 F. Supp. 830 (D. C. Md. 1940) (affirmed *per curiam* in the Court of Appeals for the Fourth Circuit on the opinion of the court-below and reported in 113 F. (2d) 932 (1940)) and of *Gary Theatre Co. v. Columbia Pictures Corporation,* 120 F. (2d) 891 (C. C. A. 7th, 1941), are also not in conflict with this present case. The *Westway Theatre* case was a suit by an exhibitor who came into a territory with a new theatre and complained that clearances imposed on his theatre in favor of the older established theatre would be a violation of the anti-trust laws. The Court in failing to find a conspiracy commented significantly that "it seems to be a common occurrence in the business that old and established theatres in the vicinity of a new theatre demand, or at least seek, a clearance over the new theatre."

In the case at bar, the new theatre in the hands of monopolists in the motion picture industry eliminated the older established theatre of the respondent in order to forward and maintain the position of Paramount and its affiliated company.

In the *Gary Theatre* case, the plaintiff was the owner of the Palace Theatre, Gary, Indiana, and questioned the right of exhibitors to license film under "priority of run and clearance". In the *Gary* case there was no simultaneous shutting off of runs from a theatre. Moreover, the decision in the *Gary Theatre* case is at variance with the later decision in the same court, namely, *Bigelow v. RKO Radio Pictures, Inc.,* 162 F. (2d) 520 (1947) (cert. den. 332 U. S. 817 (1947)), and with the decisions of this Court in the *Griffith, Schine* and *Paramount* cases, *supra.*

The *Westway Theatre* case and the *Gary Theatre* case are similar to the instant case only in the fact that they each concern the question of motion picture products for theatres, but at that point the resemblance ends. In neither

of the cases was there any disturbance of any prior situation of status quo. What the plaintiff in each of the two cases wanted to do was to upset the former status and to demand that the distributors enter into an entirely new course of dealings. And, in any event, any doubt as to the right of an exhibitor under circumstances of the present case has been laid to rest by the decisions of this Court in the *Paramount, Griffith* and *Schine* cases, *supra.*

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.